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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 109

Civ. 21-271.

PUBLIC SERVICE COMMISSION OF THE STATE OF
NEW YORK (STATE DIVISION, DEPARTMENT OF PUBLIC
SERVICE), CITY OF YONKERS, AND JOHN W. TOOLEY,
JR., AS PRESIDENT OF COMMITTEE OF YONKERS COMMUTERS,
A VOLUNTARY UNINCORPORATED ASSOCIATION COMPOSED OF
MORE THAN SEVEN MEMBERS,

Plaintiffs,

against

UNITED STATES OF AMERICA AND THE NEW YORK
CENTRAL RAILROAD COMPANY,

Defendant.

MEMORANDUM.

This is an application for an order staying and suspending the operation, execution and enforcement of the certificate or order of the Interstate Commerce Commission dated March 20th, 1943 in Finance Docket #13914 as extended by its orders dated April 19th, 1943 and May 28th, 1943 and restraining and enjoining the defendant, New York Central Railroad Company and all persons from taking any action in pursuance of said orders and certificates of the Interstate Commerce Commission and from in any

manner abandoning or attempting to abandon or curtailing or attempting to curtail its present operation of its so called Yonkers Branch until the hearing and determination of the United States Supreme Court of the appeal which has been taken by said plaintiffs from a final judgment of the United States District Court for the Southern District of New York rendered on June 10th, 1943. We are informed that the counsel for defendant, United States of America, will make a motion to affirm the judgment of the court below. We oppose said motion.

The appeal herein has been perfected.

The judgment appealed from was the opinion of the United States Statutory Court found in Schedule I of our petition. It was filed on June 10th, 1943. The opinion stated "no findings by us are necessary or appropriate under the circumstances".

On June 11th, 1943, the next day after the judgment was filed an application was made to the said Statutory Court for an order for a temporary stay pending the application of the plaintiffs for an order for a stay to the United States Supreme Court or one of the justices thereof pending the hearing and determination of the appellant's appeal to that court. This temporary stay was granted until June 12th, 1943 midnight in order to give plaintiffs an opportunity to make said application. We are now in this court seeking relief asked for in our petition and at the same time opposing the motion to affirm made by the defendant, United States of America.

The facts in this case as we view them are substantially as follows:

The above entitled proceeding was instituted by an application of the New York Central Railroad Company under appropriate paragraphs of Section 1 of the Interstate Commerce Act for a certificate that the present and future

public convenience and necessity permit of the abandonment by the New York Central Railroad Company of a line of railroad between Van Cortlandt Park Junction, New York City in the County of Bronx and Getty Square, Yonkers in the County of Westchester, State of New York.

The City of Yonkers appeared at a hearing on this application held in City Hall, Yonkers, New York, on November 12th, 1942 as a protestant against said application and as such protestant opposed the said application. After said hearing and on about February 8th, 1943, a proposed report was filed by Lucian Jordan, one of the examiners for the Commission, in which said proposed report he recommended that the application of the New York Central Railroad Company for the abandonment of said line should be granted.

On or about the 13th day of February, 1943, the City of Yonkers, New York, as a protestant excepted to the report an order proposed by said Examiner Jordan which exceptions were duly filed. A hearing was held by the Interstate Commerce Commission, Division 4, as to City report at its office in Washington, D. C. on the 3rd day of March, 1943 on which day our argument was heard as to said City report and a transcript of that record is incorporated in our complaint in this action and marked Exhibit H by reference.

On or about the 20th day of March, 1943, the said Interstate Commerce Commission, Division 4, consisting of Commissioners Porter, Mahaffie and Miller filed their report and issued a certificate or order directing the abandonment of said line and further ordered in said certificate or order that the abandonment should take effect and enforced from the date set forth in said order or certificate.

The City of Yonkers on the 17th day of April, 1943 as a protestant filed a petition with the said Commission for a review, rehearing and reconsideration and reargument of said order and also that the order of the Interstate Com-

merce Commission be stayed to a later date, that the execution of the first order was extended by orders dated April 19th, 1943 and May 29th, 1943. In May 10th, 1943, the Interstate Commerce Commission made its order denying the petition for rehearing without allowing the protestants to appear at said hearing. Subsequent orders suspending the abandonment of the line were made and finally a temporary stay was granted by the United States District Statutory Court until Saturday, June 19th, 1943 at midnight.

The plaintiffs instituting this suit were listed as parties and appeared in all of the proceedings before the Interstate Commerce Commission.

The plaintiff, City of Yonkers, sues on behalf of itself and its inhabitants. It is their claim and it is a fact that they would be irreparably damaged by the abandonment of said line. The branch which the defendant, the New York Central Railroad, proposes to abandon is called Yonkers Branch, Putnam Division, New York Central Railroad Company, and is an electric railway and is commonly known and designated by the defendant railroad company as the "Yonkers Branch." Its northerly terminus is at Getty Square in the City of Yonkers, from whence it proceeds generally in a southerly direction through the City of Yonkers to the boundary line between the City of Yonkers and the City of New York, where it enters Van Cortlandt Park in the City of New York and continues generally in a southerly direction within the City of New York to the southerly terminus of said line of railway at Sedgwick Avenue, New York City. The distance between Getty Square, Yonkers, and Sedgwick Avenue, New York City, is 7.8 miles.

At a point on said electric railway, 3.1 miles from Getty Square in Yonkers, there is a junction, known as Van Cortlandt Park Junction, where the so-called Putnam Division of the defendant railroad company joins said electric rail-

way. From that point southerly to the Sedgwick Avenue terminus the steam trains of the Putnam Division operate over the same tracks as the electric railway. Northerly from Van Cortlandt Park Junction, the Putnam Division proceeds in a northeasterly direction as far as Brewster, N. Y., while the so-called Yonkers Branch proceeds in a northwesterly direction to Getty Square, Yonkers.

The trains of the Putnam Division are operated by steam (not electricity), and the Putnam Division is not electrified. Therefore, the electric trains of defendant railroad company which operate over the electric railway in question are not and cannot be operated over the Putnam Division; such electric trains are operated only between Getty Square, Yonkers, and Sedgwick Avenue in New York City. The line of said electric railway, and that of the Putnam Division, are shown upon the map attached to defendant railroad company's application to the Interstate Commerce Commission (Ex. A.).

In connection with its application to the Interstate Commerce Commission, defendant railroad company stated:

"The line of railroad sought to be abandoned was constructed partly by Yonkers Rapid Transit Railway Company and The Yonkers Rapid Transit Railway Company and was completed by the New York and Northern Railway Company in 1888. *The branch was built for the purpose of developing suburban business between the City of Yonkers and the City of New York.*" (Ex. A, Return to Q. p. 2).

The line was electrified in 1926, and, in the words of a witness for the railroad company, "it was expected that a greater number of people having their business in New York City would reside in Yonkers and utilize the electric service to travel back and forth to business." (S. M. 12).

The electric trains are comprised of two, three or four cars, including the hauling car which is not a locomotive

but is an "MU" (multiple unit) car. In addition to supplying the means of locomotion for the train the MU car has provision for carrying passengers of its own—it is "somewhat in the nature of a trolley car." (S. M. 53) The structure of the line is such that locomotives cannot be used thereon, and the line carries no freight whatever. In the words of the railroad company's witness: "You have got a line that is built primarily for commuter passenger business." (S. M. 52-54)

The line carries over 600 passengers (each way) daily at the present time.

The stenographic minutes and exhibits referred to above are in the record of the Interstate Commerce Commission.

For fifty-five years the said railroad performed the function for which it was constructed, namely the development of suburban business between the City of Yonkers and the City of New York.

In the year 1890 the population of the City of Yonkers was 32,033. The present population of the City of Yonkers is 142,000.

The part of the railroad proposed to be abandoned within the confines of the City of Yonkers has four stations, namely, Caryl, Lowerre, Park Hill and Getty Square.

In the course of these fifty-five years prosperous suburban real estate developments have been built up around these stations: There is a very large development around said Caryl Station. In addition to purely suburban and residential properties, large apartment houses have been erected in that section as well as stores and other business buildings. The same may be said about the growth of the City of Yonkers around the Lowerre Station. This is known as the Lowerre Section of the City of Yonkers and in this section are suburban homes, large apartment houses and many substantial business places, churches and schools.

The next station is that known as Park Hill. The Park Hill Section on the easterly side of the railroad is purely residential and considered one of the most pretentious real estate developments in the City containing many substantial residences and is almost a community in itself, having its own social life centered around what is known as the Park Hill Country Club. The next station is Getty Square. This station is in the heart of the City of Yonkers and in Getty Square so-called are the largest and most pretentious buildings in the City. It contains all the main bank buildings and other business buildings. In recent years the Getty Square Station is contained in the First National Bank Building. This building also contains the main offices of the First National Bank. The upper floors are used for offices. It can be safely said that Getty Square is the hub and business center of the City of Yonkers.

This proposed abandonment would interrupt the orderly process of life of a large proportion of the people in these local communities mentioned for they have depended for many years in a large measure on the railway service furnished by the railroad which the defendant, New York Central Railroad Company, proposes to abandon. These local communities would not only lose this railroad service, but in addition they would lose large sums in real estate values which would affect every property owner within the vicinity of this railroad proposed to be abandoned, and the resultant effect would be that the plaintiff, City of Yonkers, would also suffer great loss by reason of the diminution and loss of taxes.

The Jurisdictional Question Involved.

The jurisdiction of the Interstate Commerce Commission with respect to abandonments is found in Section 1, subdivisions 18 and 22, of the Interstate Commerce Act (49 U. S. C. A. Sec. 1, subds. 18, 22).

Subdivision 18 of Section 1 provides, in part, that:

"no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

This broad grant of authority is specifically limited by subdivision 22 of Section 1, which provides as follows:

Sec. 1, par. (22) *Construction, etc., of spurs, switches, etc., within State.* The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of *street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.*"

The report of Division 4 (Complaint Ex. I) shows that the Interstate Commerce Commission made no findings whatever with respect to the question of whether this line is a "suburban, or interurban electric railway * * * not operated as a part or parts of a general steam railroad system of transportation," which is specifically excluded by statute from the jurisdiction of said Commission with respect to approval of its abandonment (28 U. S. C. A. Sec. 1, subd. 22).

If the line in question is a "suburban or interurban railway" as defined in subdivision 22 of Section 1 of the Constitution, the Interstate Commerce Commission has no jurisdiction to authorize its abandonment. Therefore, the Certificate and Orders of the Commission are null and void.

No findings were made by the Commission itself as to whether or not this line between Getty Square, Yonkers,

and Sedgwick Avenue, New York City, is a suburban or interurban electric railway and no finding was made as to whether or not the line is "operated as a part or parts of a general steam railroad system of transportation". This question was specifically called to the attention of the Commission before it finally acted in this matter (Exhibits X, L, M, our Bill of Complaint).

In any event when jurisdiction is not waived it is elementary that it can be raised at any time.

The United States District Statutory Court made no findings either on this question, although we believe it is required to do so even if it dismissed the Complaint on the merits.

In the entire record there is no one solid finding of fact stating just what type of railway this is.

In the cases in this Court we have read on this question, in relation to subdivision 22 of Section 1 of the Interstate Commerce Act, that there has always been a finding by the Interstate Commerce Commission as to whether or not the railway in question came within or without the statute.

* As was said in *Florida v. United States*, 282 U. S. 194:

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination * * * but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

The Commission before it proceeded should have first considered whether it had jurisdiction or not.

United States v. Baltimore & Ohio R. Co., 293 U. S. 454.

Apart from that contention, we submit it is clear from the record made before the Interstate Commerce Commission that if it did find it had jurisdiction such a finding would have been wholly without substantial evidence to support it; and that, upon the undisputed facts as disclosed by such record, the line in question falls within the exception to the jurisdiction of the Commission as contained in subdivision 22 of Section 1 of the Interstate Commerce Act. In a case involving the question of whether an abandonment authorized by the Interstate Commerce Commission constituted a "spur" within the meaning of the very statutory provision involved in this case, the Supreme Court said:

"Whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a State commission." (*United States v. Idaho*, 298 U. S. 105, 109)

In *Piedmont & Northern Ry. Co. v. Interstate Commerce Commission* (286 U. S. 299) the Court described a "suburban or interurban electric railway" in terms which are peculiarly significant and applicable to the facts of this case, as follows:

"No difficulty is encountered in defining a street or a suburban electric railway. These are essentially local, are fundamentally passenger carriers, are to an inconsiderable extent engaged in interstate carriage, and transact freight business only incidentally and in a small volume. The record indicates that prior to 1920 such street or suburban railways had grown in many instances so as to link distinct communities, and that in addition so-called interurban lines were constructed

from time to time, to serve the convenience of two or more cities. *But the characteristics of street or suburban railways persisted in these interurban lines. They also were chiefly devoted to passenger traffic and operated single or series self-propelled cars. Many of them carried package freight, some also transported mail, and still fewer carload freight picked up along the line or received for local delivery from connecting steam railroads.*"

In the present case, it will be noted that *no freight whatever* is carried by the line in question. It is solely a passenger line—" * * * You have got a line that's not built for freight. You have got a line that is built primarily for commuter passenger business" (S. M. 54 Hearing before Commission). There is no evidence in the record made before the Commission that it is engaged to *any extent whatever in interstate commerce*. It is "essentially local" and carries passengers between the four stations in the City of Yonkers, to stations in the City of New York. It is operated by "single or series self-propelled cars"—The "MU" car, and the undisputed evidence shows that ordinary locomotives cannot be operated over the line—"As I say, these bridges are too light for a locomotive." (S. M. 54, Hearing before Commission).

See

U. S. v. Chicago, North Shore & Milwaukee Railroad Co., 288 U. S. 1, 9-10.

We think there can be no question that, tested by the criteria referred to by the Supreme Court, this line is a "suburban or interurban electric railway" within the meaning of subdivision 22. The fact that the line was not originally constructed as an "electric railway," is, we submit, immaterial. So far as "abandonment" is concerned, the statute relates to *presently existing* "suburban or inter-

urban railways" and there is nothing in the statute or in the decisions thereunder which purports to limit its application to railways which were originally constructed as electric railways. It might be urged that the line proposed to be abandoned is not individually owned and is the property of the New York Central Railroad Company. The cases seem to hold that the question of a single ownership is not controlling interpreting the statutes involved herein.

In the development of transportation, steam railways, of course, preceded electric railways. When subdivision 22 was first enacted in 1920 (Transportation Act of 1920, c. 91, Sec. 402, 41 Stat. 478) there were undoubtedly in existence electric railways of the described class which were originally operated by steam and had later been converted to electricity when that source of motive power was introduced. Certainly no one would contend that such electric railways were not within the purview of subdivision 22 at the time of its enactment in 1920. Nor can it be said that subdivision 22 applies only to electric railways which were in existence at the time of its enactment. Such a construction would exclude electric railways thereafter constructed, contrary to the manifest intention of the Legislature to exclude from the jurisdiction of the Commission *all* electric railways within the described class. When the line in question was electrified in 1926 the effect thereof, so far as the statutory provision is concerned, was exactly the same as though an entirely new line was constructed. Thereafter the line constituted a "suburban or interurban electric railway" and the provision in question became applicable thereto.

But one further question remains—is the line "*operated*" as a *part* or parts of a general steam railroad *system of transportation*"? We submit that this phrase relates to the situation where the "suburban or interurban electric railway" is an integral link in a steam railroad "system."

the construction or abandonment of which would constitute an "extension" of such "steam railroad system of transportation" or an "abandonment" *pro tanto* of such "steam railroad system of transportation."

The so-called "Hudson Division" of the defendant railroad company affords an example. That division is a part of the line of the railroad between New York and Chicago. It is electrified from New York to Harmon, and passes through the City of Yonkers. An abandonment of the portion of that line between New York City and Yonkers would constitute an abandonment of a "portion of a line of railroad" within the meaning of subdivision 18 of Section 1 of the Interstate Commerce Act and although such portion is an "electric railway" running between the City of Yonkers and the City of New York and is, therefore, "interurban," it is also obviously "operated as a part or parts of a general steam railroad system of transportation" and, therefore, is not within the exception provided for in subdivision 22.

The so-called "Yonkers branch," on the other hand, is not "operated as a part" of defendant railroad company's Putnam Division or of any "general steam railroad system of transportation," albeit the Yonkers Branch and the Putnam Division trains pass over the same trackage as far as Van Cortlandt Park junction. The trains of the "Yonkers branch" cannot pass over the Putnam Division to Brewster, because that line is not electrified beyond Van Cortlandt Park Junction; the Yonkers branch trains proceed only to Getty Square, Yonkers. Conversely the trains of the Putnam Division, which are drawn by steam locomotives, cannot proceed over the Yonkers branch to Getty Square, because the bridges on the electric line will not carry the locomotives.

The electric railway in question is not in any real sense operated as a "part" of the Putnam Division. It is a

"commuters line" admittedly designed for the specific purpose of carrying commuters between their homes in Yonkers and their places of business in New York City. If the line were abandoned the Putnam Division would continue to operate as it has in the past, and the abandonment would not interfere in the slightest degree with such operation. On the other hand, service on the Putnam Division—the "general steam-railroad system of transportation"—could be discontinued, and the "Yonkers branch," from Sedgwick Avenue, New York, to Getty Square, Yonkers, being electrified, could continue in operation. The two lines are wholly independent except for the fact that for a distance of approximately 4.7 miles they use the same track. That fact, we submit, is wholly immaterial; the situation, for the purposes of the statutory provision involved, is exactly the same as though a separate line of track, paralleling the existing track, were installed to carry the electric railway trains.

In this connection it is to be observed that mere physical connection and interchange of traffic with a "general steam-railroad system of transportation" does not take a line out of the exception provided by subdivision 22. Thus in *United States v. Chicago North Shore & Milwaukee R. Co.* (288 U. S. 1) the Court held the railway there involved to be without the jurisdiction of the Interstate Commerce Commission under Section 20-a of the Interstate Commerce Act (which relates to the issuing of securities and contains a similar provision) despite the existence of facts which the Court stated, in part, as follows:

"Twenty fast through passenger trains are operated daily in each direction between downtown Chicago and downtown Milwaukee with a running time equally that of the fastest trains of the Chicago and Northwestern Railway . . . Dining cars and parlor cars are included in some of the appellee's fast trains. Modern, well equipped passenger stations are main-

tained at a number of points; 51 have agents selling passenger tickets; at some 96 places shelters and platforms are maintained, at 35 platforms only; and at 42 locations at which certain trains stop at streets or highways no facilities are provided. *Through railroad and Pullman tickets are sold to any part of the United States, Canada or Mexico. Local passenger fares are computed on the mileage bases used by steam railroads.*"

Nevertheless, the Supreme Court held that the line was an "interurban electric railway which is not operated as a part of a general steam railroad system of transportation" under Section 20 a, and in so holding the Court referred to subdivision 22 of Section 1 "which," the Court said, "is couched in the same words as the exception in Section 20 a (1)."

We are aware of the fact that in a later proceeding the Interstate Commerce Commission found that the above mentioned Chicago, North Shore & Milwaukee line was not an interurban railroad and its decision was affirmed by a Federal Court (See 122 Fed. 2d, page 128). In this later proceeding the Commission made a specific finding of fact as to the status of the railroad case in question.

In the case at bar, as we have already pointed out, there is no finding whatever as to the status of the Putnam Division, New York Central Railroad.

These contrary decisions do not unnecessarily disturb us, for, as Judge Roberts said in the *Chicago, North Shore & Milwaukee Railroad Company* case, 288 U. S., at page 11:

"As indicated in the *Piedmont & N. R. Co.* case, supra, the phrase 'interurban electric railway' may not in all circumstances be susceptible of exact definition. The Commission has realized the difficulty."

Mr. Justice Roberts then goes on to cite examples as to the uncertainty of the Interstate Commerce Commission as

to the meaning of subdivision 22, paragraph 1 of the Interstate Commerce Act.

We believe, in the first place, that the Interstate Commerce Commission had no jurisdiction over the line proposed to be abandoned. In the second place, that if it had it should have made a proper finding of fact that it had jurisdiction, so that the question of its jurisdiction could be properly raised. In the third place, we believe that the United States District Statutory Court erred in assuming that the Interstate Commerce Commission had jurisdiction in this case and, if that Court believed that the Commission had jurisdiction, it should have made an appropriate finding to that effect.

As already pointed out, the proposed abandonment of this line means a curtailment of local service and the discontinuance of four of its stations in the City of Yonkers, namely, Caryl, Lowerre, Park Hill and Getty Square. If there is no overriding interest of interstate commerce, the power to regulate purely local service and discontinue stations is within the State. (See Section 54 of the Railroad Law of the State of New York, as amended.) (Chapter 43 of the New York Consolidated Laws).

As said in the case of *Palmer v. Massachusetts*, 308 U. S. 79-90, in an opinion written by Mr. Justice Frankfurter, pages 83, 84 and 85:

"Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates

one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.

To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere. But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 US 352, 57 L ed 1511, 33 S Ct 729, 48 LRA (NS) 1151, Ann Cas 1916A 18; cf. *Kelly v. Washington*, 302 US 1, 82 L ed 3, 58 S Ct 87.

The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the states. Even when the Transportation Act in 1920 gave the Interstate Commerce Commission power to permit abandonment of local lines when the over-riding interests of interstate commerce required it, *Colorado v. United States*, 271 US 153, 70 L ed 878, 46 S Ct. 452, this was not deemed to confer upon the Commission jurisdiction over curtailments of service and partial discontinuances. *Re Kansas City S. R. Co.*, 94 Inters Com Rep 691; see *Re Morris & E. R. Co.*, 175 Inters Com Rep 49."

Our papers for an order for a stay show that the Plaintiff, City of Yonkers, will be irreparably damaged and suffer great hardship if the line is abandoned.

We, therefore, pray that under all the circumstances, first, that the motion for affirmance be denied, and, second, that an order for an application for a stay be granted pending the hearing and determination of the appeal taken by us to the Supreme Court of the United States.

Respectfully submitted,

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